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No. 85-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Appellant,

vs.

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL.,
Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM OF APPELLEES VILLAGE OF PLEASANTVILLE, ET. AL.

MICHAEL WHITEMAN
Counsel of Record
MELVIN H. OSTERMAN, JR.
JONATHAN P. NYE
WHITEMAN OSTERMAN & HANNA
Attorneys for Appellees Village of Pleasantville, et al.
One Commerce Plaza
Albany, New York 12260
(518) 449-7600

QUESTIONS PRESENTED

1. Whether the assessment of special franchises of regulated public utilities separately and differently from other, conventional, real property denies the holders of such special franchises the equal protection of the laws?

2. Whether, contrary to *Bi-Metallic Investment Co.* v. *State Board*, 239 U.S. 441 (1915), a special franchise holder has in the course of a judicial review of the assessment of its special franchise a due process right to wage a collateral attack on the equalization rate used in computing that assessment?

3. Whether an appeal from a non-final order dismissing one aspect of consolidated proceedings to review real property tax assessments for multiple years is justiciable by this Court prior to disposition of all aspects of those proceedings for all years?

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On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

Appellees the Towns of Greenburgh, Harrison, New Castle, Ossining and Yorktown, the Villages of Ardsley, Briarcliff Manor, Bronxville, Mount Kisco, Ossining, Pelham and Pleasantville and the City of Peekskill move pursuant to Rule 16 of the rules of this Court to dismiss or affirm on the ground that this appeal fails to present a substantial federal question and that the decision of the court below is so obviously correct as to warrant no further review, or in the alternative that this appeal is not justiciable.

STATEMENT OF THE CASE

Beginning in 1975, appellant Consolidated Edison Co. of New York, Inc. ("Con Edison") instituted proceedings to review the assessments of its special franchises in various municipalities in the counties of Westchester and Rockland and in the City of New York.[1] In New York State, a special

[1] The 168 consolidated proceedings that form the basis of this appeal relate to petitions filed in the years 1975-1978, respecting tax years 1974-1977.

franchise is defined by section 102(17) of the New York Real Property Tax Law ("RPTL") as the right granted to a regulated utility to install and operate poles, pipes, wires and other equipment upon or under the public streets in the areas served by the utility.[2] The New York State Legislature first provided in 1899 for the taxation of this right as if it were real property, a practice the constitutionality of which is not questioned. *See People ex. rel. Metropolitan Street Ry. v. State Board,* 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd,* 199 U.S. 1 (1905).[3]

Con Edison's petitions challenged the assessments of its special franchises on three grounds: overvaluation, inequality and illegality (A-51).[4] Stated simply, a claim of overvaluation is an assertion that the assessment of a taxpayer's property is in excess of the full value of the property.[5] A proceeding based on inequality alleges that other similarly-classed property in the taxing district is assessed at a lesser proportion of full value than is the taxpayer's property.[6] A claim of illegality may be based upon certain other errors that may result in an improper assessment.[7]

Those portions of Con Edison's petitions alleging illegality of assessment have been dismissed by the New York courts.[8] A consolidated trial of the issue of overvaluation (covering not only the tax years 1974-1977, but also additional tax years up to and including the tax year 1985), commenced in 1983 and was

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[2] N.Y. Real Prop. Tax Law §102(17) (McKinney 1984).

[3] The special procedures governing the assessment and taxation of these special franchises are contained in what is now article 6 of the New York State Real Property Tax Law (hereinafter referred to in text as the "RPTL"), as well as in portions of article 7 of that law.

[4] References to the Appendix to Con Edison's Jurisdictional Statement are cited as "(A-)." References to the Jurisdictional Statement are cited as "(JS-)."

[5] *See* N.Y. Real Prop. Tax Law §701(4) (McKinney 1984). The statute defines such an assessment as "excessive."

[6] *See* N.Y. Real Prop. Tax Law §701(8) (McKinney 1984).

[7] *See* N.Y. Real Prop. Tax Law §701(9) (McKinney 1984). Such an assessment is defined as "unlawful."

[8] *Consolidated Edison Co. of New York, Inc. v. State Board,* 45 N.Y.2d 706 (1978).

ongoing at the time Con Edison's Jurisdictional Statement was filed.[9] The inequality portions of the petitions have also been dismissed as a matter of law by the New York courts.[10] That dismissal is the subject of this appeal.

Unlike ordinary real property, the assessments of which are determined by local officials in each of the many taxing jurisdictions throughout New York State, special franchises—which often cross such jurisdictional lines—are centrally assessed by a state agency, the appellee State Board of Equalization and Assessment ("State Board").

As directed by RPTL §606, the State Board performs its assessing role by first determining the "full value" of each special franchise. The State Board is then required to apply to each such full value[11] the "latest state equalization rate," a rate previously and independently determined by the State Board, jurisdiction by jurisdiction, and used throughout the state for a wide variety of purposes, only one of which is the computation of assessments for special franchises.[12] The equalization rates

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[9] Motions to dismiss those proceedings have been made to the trial court by the appellees. The proceedings relating to tax year 1974 alone were dismissed on Con Edison's own motion on July 10, 1986. The order of dismissal is included as an appendix to this brief.

[10] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 67 N.Y.2d 783, 492 N.E.2d 130, 501 N.Y.S.2d 22 (1986) (A-2). In addition to the order appealed from, which relates solely to the inequality portions of the petitions for the years 1974-1977, on July 10, 1986, the trial court dismissed as well the inequality portions of the petitions for the years 1978-1985. Con Edison has not yet appealed from that order, although presumably it will do so.

[11] A special rule, not relevant to this appeal, applies to property installed prior to 1953. *See* N.Y. Real Prop. Tax Law §606 (McKinney 1984 & Supp. 1986).

[12] The equalization rate is promulgated by the State Board pursuant to N.Y. Real Prop. Tax Law §1202 (McKinney 1984 & Supp. 1986). As noted, it is used throughout the state for a number of purposes, including but not limited to the calculation of municipal debt and tax limits, N.Y. Const. art. VIII, §§4, 10; apportionment of school aid, N.Y. Educ. Law §§3602, 3603 (McKinney 1981 & Supp. 1986); the establishment of partial exemptions for railroads from local real property taxation, N.Y. Real Prop. Tax Law §§489-e, 489-l, 489-ee, 489-jj (McKinney 1984 & Supp. 1986); apportionment of per capita state aid, N.Y. State Fin. Law §54 (McKinney 1974 & Supp. 1986); assessment of certain farm lands, N.Y. Agric. and Mkts. Law

(footnote continues)

measure the proportion of full value at which local assessors throughout the state have assessed real property within their respective jurisdictions.[13]

When these proceedings were commenced, the parties disagreed concerning the manner in which a special franchise assessment was, for purposes of a claim of inequality, to be subject to judicial review. RPTL §720, which prescribes the manner of review for ordinary realty, permits three kinds of proof to demonstrate that a given property has been assessed unequally with other property: the so-called "selected parcels" method,[14] comparison to actual sales within the jurisdiction,[15] and comparison to the state equalization rates.[16] The provision that governs review of special franchises provides, however, only that such review may be had "so far as practicable" in the manner provided for ordinary realty.[17]

Despite the explicit language of RPTL §606 that a special franchise assessment is to be equalized by application of the latest state equalization rate, Con Edison urged that the Legislature's directive that the review provisions for ordinary realty contained in section 720 should be utilized "so far as practicable" in the review of special franchise assessments indicated the Legislature's intent to equalize special franchises in precisely the same manner as ordinary realty. Con Edison insisted that a review of a special franchise assessment must therefore encompass a determination of the "accuracy" of the applicable

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(footnote continued)

§305 (McKinney 1974 & Supp. 1986); and computation of real property tax limits on certain privately held forest lands, N.Y. Real Prop. Tax Law §480-a (McKinney 1984 & Supp. 1986).

[13] Throughout the years relevant to this appeal, local assessors were required by statute to assess ordinary real property at full value. *See Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975), *modified*, 39 N.Y.2d 920, 352 N.E.2d 593, 386 N.Y.S.2d 406 (1976) (superceded by statute). In contrast, special franchises have always been required to be assessed at the fraction of their full value represented by the equalization rate. N.Y. Real Prop. Tax Law §606 (McKinney 1984 & Supp. 1986).

[14] N.Y. Real Prop. Tax Law §720(3) (McKinney Supp. 1986).

[15] N.Y. Real Prop. Tax Law §720(3)(a) (McKinney Supp. 1986).

[16] N.Y. Real Prop. Tax Law §720(3)(b) (McKinney Supp. 1986).

[17] N.Y. Real Prop. Tax Law §740(1) (McKinney 1984).

state equalization rate previously determined by the State Board.

The State Board and other appellees to this proceeding opposed this interpretation and moved for partial summary judgment, urging that RPTL §606—which mandates the equalization of special franchise assessements by the latest state equalization rate and not by some other number—demonstrated the Legislature's intent that special franchises be assessed equally with respect to one another, but not necessarily with respect to other differently classed property. The State Board's motion was granted by the trial court,[18] which was reversed by the appellate division upon a conclusion by that court "that it was not the Legislature's intent" to foreclose a collateral attack on the equalization rates in the course of a proceeding to review a special franchise assessment.[19] That determination was upheld, without opinion, by a divided New York Court of Appeals.[20]

Following this ruling, but before any trial or other proceedings were commenced, the Legislature amended[21] RPTL §744(1), to ensure that the procedural rule of RPTL §740 was interpreted consistently with the substantive directive of RPTL §606. As amended, section 744(1) provides in pertinent part:

> Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue.

N.Y. Real Prop. Tax Law §744(1) (McKinney 1984).

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[18] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 98 Misc. 2d 491, 413 N.Y.S.2d 1012 (Sup. Ct. 1979) (A-113).

[19] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 73 A.D.2d 31, 35, 425 N.Y.S.2d 651, 654 (1980) (A-105, 109).

[20] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 53 N.Y.2d 975, 424 N.E.2d 556, 441 N.Y.S.2d 669 (1981) (A-103).

[21] N.Y. L. 1982 ch. 714 §24.

The Legislature thus made manifest that, in accordance with section 606, equality of assessment for special franchises must obtain only among special franchise properties themselves, not necessarily between special franchises and ordinary realty.[22]

Based on this legislation, the State Board and other appellees again moved for partial summary judgment (A-32); Con Edison cross-moved for a declaration that the legislation was unconstitutional, both facially and as applied (A-39). The constitutionality of the legislation was upheld by the trial court,[23] by a unanimous appellate division[24] and by a unanimous New York Court of Appeals.[25] The opinion adopted by that court explained:

> When this matter was last before this court, the issue was whether, as a matter of statutory interpretation, a special franchise holder could contest the equalization rates. As a result of the amendment which is the subject of this appeal, that issue is now settled: a special franchise holder is precluded from judicially contesting the equalization rates.

(A-8). Con Edison then filed a notice of appeal to this Court (A-28).

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[22] The New York courts recognized in this case that, as a matter of policy, the Legislature intended special franchises to be assessed at a ratio equal to that applied to other property. The courts also recognized, however, that the Legislature had determined that the best means of effectuating this policy was by strict reliance on the state equalization rates (A-9).

[23] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 120 Misc. 2d 617, 466 N.Y.S.2d 575 (Sup. Ct. 1983) (A-25).

[24] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 103 A.D.2d 453, 480 N.Y.S.2d 789 (1984) (A-5, 9).

[25] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 67 N.Y.2d 783, 492 N.E.2d 130, 501 N.Y.S.2d 22 (1986) (A-2).

SUMMARY OF ARGUMENT

In this appeal, Con Edison argues that equalization of its special franchise assessments by use of the state equalization rates, which it claims may result in assessments of its special franchises at a different proportion of value than those of ordinary real property, violates its right to the equal protection of the laws. Con Edison further argues that the absence of a hearing on this purported issue deprives Con Edison of due process of law.

In the alternative, Con Edison asserts that interim decisions in these proceedings in the New York courts concerning issues of statutory interpretation somehow bestowed on Con Edison's rights that the New York Legislature and courts were powerless to change.

Finally, Con Edison asserts that in the course of a proceeding to review its assessments, it must have a right to review the "accuracy" of administrative action of state-wide application taken long before in an entirely separate proceeding.

As will be demonstrated, special franchise property has been identified and taxed by the New York Legislature as a separate class of property for nearly one hundred years, and neither the fact of that classification nor the possibility that proportionally different assessments may result from it creates any constitutional infirmity. Furthermore, since the "accuracy" of the equalization rate is not an issue in a proceeding to review a special franchise assessment, either as a matter of New York law or constitutional requirement, the absence of a hearing on that issue cannot deprive Con Edison of anything.

As will be further demonstrated, the underlying premise of the earlier decisions of the New York courts in these proceedings has since been corrected by the legislature and the courts of New York, and that correction must, in accordance with long-standing decisions of this Court, be applied to these proceedings.

Finally, it will be demonstrated that Con Edison has no standing in these proceedings to argue that the State Board failed to follow its statutory mandate in establishing the equalization rates for the state, and indeed has no standing in this Court on any issue at all.

ARGUMENT

I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. The Assessment of Special Franchise Property as a Separate Class Has a Rational Basis and Does Not Deny Con Edison the Equal Protection of the Laws.

Con Edison asserts that RPTL §744(1) denies it the equal protection of the laws in contravention of the fourteenth amendment to the Constitution by permitting its property to be assessed at a higher percentage of full value than that of other "similarly situated" taxpayers (JS-10-11). Con Edison's argument is based upon its erroneous premise that "[i]n this case, the state courts have ruled definitively that the state statutes created only one class of real property for tax purposes during the years here in question" (JS-11).

None of the authorities cited by Con Edison even remotely supports this proposition. Indeed, the opinion adopted by the New York Court of Appeals, from which this appeal is taken, demonstrates exactly the contrary:

> Central to petitioner's constitutional arguments is its premise that a special franchise holder has a constitutional right to be assessed at a ratio equal to that being applied to other property holders. We find no support for this proposition. It is clear that special franchise property is of a different nature than other real property *and the Legislature, by creating separate articles dealing with the assessment procedures for special franchises and real property generally, has recognized this distinction.*

(A-9) (emphasis supplied).

Thus, contrary to Con Edison's assertions, the New York Legislature has declared and the New York courts have recognized that special franchises *are* a separate class of property as a matter of state law. Accordingly, the only federal question respecting this issue is whether New York may for purposes of real property taxation constitutionally differentiate

between ordinary realty and special franchises, an issue not advanced by Con Edison and, in any event, long ago settled by this Court. *See New York Rapid Transit Corp. v. City of New York,* 303 U.S. 573 (1938), *aff'g* 275 N.Y. 258, 9 N.E.2d 858 (1937); *Cincinnati, New Orleans & Texas Pacific R. Co. v. Kentucky,* 115 U.S. 321 (1885).

B. Con Edison Has No Due Process Right to a Hearing on an Equal Protection Claim That Does Not Exist.

Building on the erroneous premise that special franchise property is exactly like ordinary real property, Con Edison argues that RPTL §744(1) deprives it of due process of law by eliminating a hearing on its claim that differential treatment of its special franchises denies it the equal protection of the laws. Because Con Edison has no such claim, however, the absence of a hearing on it logically cannot deprive Con Edison of anything.

Con Edison's apparent reliance on *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930), is misplaced. Unlike the instant case, *Brinkerhoff* concerned the denial of the opportunity to be heard on a taxpayer's unquestioned right to be treated equally with other taxpayers with similarly classed property. Con Edison has been heard in the New York courts on the question of the class of property to which its special franchises must be equalized, however, and Con Edison has lost. Under New York law, as construed by the New York Court of Appeals, public utilities, including Con Edison, have no right to assessment of their special franchises on the same basis as ordinary realty. Taxation of special franchises as a separate class is thus statutorily mandated and, as demonstrated above, constitutionally permissible. Accordingly, the denial of a hearing on the question whether Con Edison's special franchises were treated equally with ordinary real property does not result in any deprivation of property without due process of law.

Similarly unavailing is Con Edison's argument (JS-14-16) that the evidentiary rule of RPTL §744(1) deprives it of due process of law by eliminating "the only evidence that could possibly have proved the claim, thereby destroying the claim

itself" (JS-4). The claim to which Con Edison argues it was entitled, presumably, was the right to challenge the accuracy of the state equalization rates. As the New York courts have now recognized, however, the accuracy of those rates is not an issue in an inequality proceeding involving special franchises. Accordingly, the elimination of evidence relative to that issue can be of no consequence:

> Contrary to petitioner's contention, this court's decision did not give petitioner a cause of action for a refund of taxes, nor did it establish that petitioner had a viable claim for a refund of taxes. This court simply held that, in the context of its cause of action for inequality, petitioner had a right to contest the equalization rates, *as a matter of statutory interpretation.* There had not yet been any determination that the equalization rates were inaccurate, no less a determination that petitioner was entitled to a refund. Thus, the statutory amendment did not deprive petitioner of any cause of action or substantive right granted to it by this court.

Consolidated Edison Co. of N.Y., Inc. v. State Board, 103 A.D.2d 453, 459, 480 N.Y.S.2d 789, 793-94 (1984), *aff'd,* 67 N.Y.2d 783, 492 N.E.2d 130, 501 N.Y.S.2d 22 (1986) (A-11) (emphasis in original).

The New York courts have definitively interpreted the Real Property Tax Law as withholding any substantive right of inter-class equalization from special franchise taxpayers. Con Edison is thus relegated to an argument that such an interpretation may not constitutionally be applied to these proceedings. That such an argument must fail was settled, however, during the time of Chief Justice Marshall, and the rule then articulated—that courts must apply the law in existence at the time of decision—has been adhered to ever since. *See United States v. The Schooner Peggy,* 5 U.S. [1 Cranch] 103 (1801); *Huddleston v. Dwyer,* 322 U.S. 232 (1944); P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System,* 316 n.4 (1973).

C. Con Edison Had No Entitlement to Assert, in the Course of a Proceeding to Review its Assessment, that the State Board Did Not Follow its Statutory Mandate in Promulgating Equalization Rates.

Con Edison asserts in the alternative that, even if the Constitution permitted New York State to equalize special franchise assessments by use of the state equalization rates, Con Edison has been denied a hearing on its claim that the State Board "failed to adhere to statutory standards" in the promulgation of those rates. This argument is answered squarely by *Bi-Metallic Investment Co. v. State Board,* 239 U.S. 441 (1915), in which the Court elucidated the distinction between equalization and valuation and articulated the differing procedural requirements attendant upon each.

The Court held in *Bi-Metallic* that no hearing is constitutionally required in connection with the establishment of an equalization rate that is to be applied across-the-board to all members of a particular class. The Court distinguished *Londoner v. Denver,* 210 U.S. 373 (1908), relied upon by Con Edison, as concerning a wholly different issue: the right of every taxpayer to be heard on the issue of the *value* of its property,[26] a right dependent not on any statutory formulation but rather on the principle that government may not adjudicate particular facts about a party without giving that party an opportunity to be heard on those facts. *See* 3 K. Davis, *Administrative Law Treatise,* §15:9 (2d. ed. 1980).

As Justice Holmes explained:

> [In *Londoner*] [a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

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[26] A right Con Edison is currently pursuing at the trial level. See pp. 2-3 *supra.*

Bi-Metallic Investment Co. v. State Board 239 U.S. 441, 446 (1915). By contrast,

> [w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power.

239 U.S. at 445.

Consistent with these principles, New York law defines the establishment of an equalization rate as a legislative or rule-making rather than as an adjudicatory function.[27] Moreover, in New York, an equalization rate cannot conceivably be related to particular facts about a utility such as Con Edison because special franchise properties, which are not assessed by local assessors, form no part of the class of properties examined by the State Board for purposes of establishing the state equalization rates.

Con Edison's seeming assertion that it has standing to object that "the State Board legislated the amount of taxes payable by special franchise owners, a power which was not, and could not be, granted to it" (JS-17) raises entirely differ-

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[27] Section 102(2)(a)(ii) of the State Administrative Procedure Act defines a "rule" as including "the amendment, suspension, repeal, approval, or prescription for the future of rates, wages . . . or practices bearing on any of the foregoing whether of general or particular applicability." N.Y. State Admin. Proc. Act §102 (McKinney 1984). In this case, the establishment of the equalization rates as a rulemaking function of the State Board was noted by the New York courts (A-21).

ent, albeit equally invalid, arguments. The first of these, that the State Board is "without power" to legislate, is a matter purely of state law, has been decided adversely to Con Edison (A-10), and raises no federal question. *See Dreyer v. Illinois,* 187 U.S. 71, 84 (1902).

The second, which is equivalent to a contention that Con Edison is, within the terms of *Bi-Metallic*, "exceptionally affected on individual grounds," 239 U.S. at 446, is an argument Con Edison may not now raise in this Court. Given the requisite standing (a showing Con Edison has neither made nor attempted to make), Con Edison may seek judicial review of the extent to which the State Board has performed its responsibility, pursuant to RPTL §1202, to ascertain equalization rates throughout the state.[28] Such review must be sought, however, not in the course of a review of an assessment, but as a challenge to the allegedly improper administrative action—in this case the State Board's establishment of the equalization rates. The time to bring such a proceeding is at the time at which a challenged equalization rate is established, not well after that rate has been promulgated and has been used for a multitude of other purposes.[29] The procedures for challenging administrative action in New York, and for seeking judicial review thereof, are amply set forth in the State Administrative Procedure Act[30] and in the New York Civil Practice Law and

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[28] Con Edison's Jurisdictional Statement is replete with accusations that the State Board "illegally, intentionally and systematically" manipulated Con Edison's assessments "for political and other reasons" (JS-6, 16, 17), none of which charges, Con Edison says, "has ever [been] denied" by appellees. To the extent that Con Edison has set forth in its petitions its perceptions of the motivations of the State Board, all such allegations are by statute deemed denied by the State Board and have been explicitly denied by the remaining appellees. *See* N.Y. Real Prop. Tax Law §712 (McKinney 1984).

[29] *See* n. 12 *supra.*

[30] N.Y. Admin Proc. Act §205 (McKinney 1984) provides for judicial review of administrative rulemaking either through a petition for a declaratory ruling or pursuant to article 78 of the New York Civil Practice Law and Rules. *See* n. 31 infra.

[31] Article 78 of the New York Civil Practice Law and Rules provides for special proceedings to review whether a body or officer of the state "failed to

(footnote continues)

Rules.[31] These procedures were simply never pursued by Con Edison, which cannot now complain that it did not enjoy rights it never sought to enforce.

II. THIS APPEAL IS NOT JUSTICIABLE.

Con Edison has the burden of establishing jurisdiction in this Court. *Memphis Natural Gas Co. v. Beeler,* 315 U.S. 649 (1942). The policy of avoiding premature adjudication of constitutional issues, moreover, demands that any doubts concerning the existence of jurisdiction be resolved against its exercise. *Minnick v. California Department of Corrections,* 452 U.S. 105, 120 (1981).

Con Edison seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. 1257(2)(1982), which provides for review in this Court of "final" state court judgments. As will be demonstrated, the 168 consolidated proceedings that are the basis of this appeal are, collectively, not final in any sense, and Con Edison's belated attempt to achieve finality with respect to a small number of its consolidated claims[32] only rendered those claims moot.

(footnote continued)

perform a duty enjoined upon it by law." N.Y. Civ. Prac. Law §7803 (McKinney 1984). Such a proceeding must be commenced within four months from the time of the determination to be reviewed. N.Y. Civ. Prac. Law §217 (McKinney 1984).

The New York courts in this case concluded that the trial court did not err in refusing to convert Con Edison's petitions to review its assessments into an article 78 proceeding, holding that Con Edison had no "viable claim to litigate" in such a proceeding (A-12). Because Con Edison has sought in these proceedings to *review its assessments,* that result was proper, in that article 7 of the RPTL provides the exclusive remedy for such review. N.Y. Real Prop. Tax law §700 (McKinney 1984). A timely article 78 proceeding that sought to review only the State Board's establishment of the equalization rates, however, would not be barred by the exclusivity provisions of article 7. As noted, Con Edison has never instituted such a proceeding.

[32] Con Edison stated in its Jurisdictional Statement that "for the year 1974, Appellant has relinquished its claim based on overvaluation" (JS-2 n.2). At the time when Con Edison's Jurisdictional Statement was filed with this Court on June 12, 1986, that statement was not accurate. Con Edison's 1974 overvaluation claims were not "relinquished" until July 10, 1986, when the trial court before which Con Edison's consolidated claims are now pending, dismissed, on Con Edison's own motion, the 1974 petitions and severed those petitions from the remaining claims. The trial court's order is included as an appendix to this motion.

A. The Proceedings Are Not Yet Final as a Matter of State Law.

The order appealed from in this case relates to 168 proceedings respecting the tax years 1974-1977 (JS-3). When Con Edison initially sought to appeal that order as of right to the New York Court of Appeals, its appeal was dismissed by that court because, as a matter of New York law, the order was not final. *Consolidated Edison Co. of N.Y., Inc. v. State Board,* 64 N.Y.2d 754 (1984). *See* N.Y. Civil Prac. Law §5601 (McKinney 1984). Con Edison ultimately obtained review by the New York Court of Appeals by permission on a certified question of law, a procedure available only with respect to non-final orders (A-2). *See* N.Y. Civil Prac. Law §5602(b) (McKinney 1984).

Although finality under state law is not absolutely determinative of jurisdiction under 28 U.S.C. §1257, the Court has departed from strict adherence to the rule of finality only when there are compelling reasons for doing so. *See Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541 (1949). Con Edison has presented no reason for the Court to depart from the requirement of finality other than the simple assertion that "the federal issue . . . will require decision regardless of the outcome of future state-court proceedings" (JS-2 n.2). Not only is that statement demonstrably incorrect, the policies underlying the finality requirement strongly counsel against the exercise of the Court's jurisdiction.

B. Adjudication of this Appeal May Lead to Fragmented Review of State Proceedings in this Court.

Foremost among the considerations that have guided the Court in its determination whether a particular state court judgment is "final" within the meaning of 28 U.S.C. §1257(2) is the avoidance of piecemeal or fragmented review. *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379 (1953). This consideration is especially pertinent when, as here, a constitutional challenge is directed toward a state court decision on a matter primarily of local concern. *Republic Natural Gas Co.*

v. Oklahoma, 334 U.S. 62 (1948). Con Edison's severance of a relatively small number of its consolidated claims simply leaves 141 of the 168 proceedings included in this appeal pending at the trial level,[33] along with the proceedings for additional years with which they have been consolidated. Moreover, those claims concern issues of valuation: issues "inherently provocative of constitutional claims." *Id.,* 72. Accordingly, Con Edison's last-minute severance of its 1974 claims[34] serves only to raise the possibility that, at some future time, the parties will once again be before this Court in these very proceedings.

C. Con Edison Does Not Have Standing to Bring its Claims Before this Court.

State court decisions not yet fully final also do not warrant review in this Court because further state proceedings may well moot or render unnecessary any constitutional decision. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973). An examination of the 1974 claims, which Con Edison has purportedly rendered final, will illustrate this consideration.

In New York, a claim of inequality of assessment requires that a taxpayer demonstrate both the value of its property and the proportion of that value that the taxpayer argues should be reflected in its assessment. *See Slewett & Farber v. Board of Assessors,* 54 N.Y.2d 547, 555, 430 N.E.2d 1294, 1296, 446 N.Y.S.2d 241, 243 (1982). In these proceedings, therefore, Con Edison must prove not only an "accurate" equalization rate but a full value to which that rate may be applied. Only then may a comparision to the original assessment be made in order to determine if a reduction of the assessment is warranted: for a given assessment, just as the equalization rate may vary, so may the value to which that rate is to be applied. Every assessment therefore may be produced by a multitude of combinations of value and rate.

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[33] Con Edison's reliance on *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978) (JS-2 n. 2), is thus misplaced. In that case, appellant had relinquished *all* of its remaining state claims in order to secure expedited review in this Court.

[34] *See* n. 32 *supra.*

The trial court's recent decision to dismiss and sever Con Edison's 1974 petitions was predicated on the court's recognition both that Con Edison's challenge to the "accuracy" of the equalization rate had been dismissed and also that, respecting the valuation portion of its petitions, Con Edison had failed to overcome the presumptive correctness of the State Board's assessments.[35]

Significantly, *no values* for Con Edison's special franchises were found by the trial court. Indeed, it is impossible to determine from the court's order whether the value of Con Edison's property should be the value contained in the appraisal filed by the State Board,[36] the sum of the values in the appraisals filed by the intervenors to these proceedings, some combination of the foregoing, or such values as were part of the original State Board assessments (values that are nowhere presented in Con Edison's submission to this Court and which can, if at all, be determined only by extrapolation from the final assessments produced by the State Board). Even if those latter values were chosen by Con Edison to be the values against which new equalization rates were to be applied, that unilateral choice cannot be used to deprive appellees to these proceedings of the right to demonstrate different, higher values for Con Edison's special franchises. Accordingly, without having established values against which new equalization rates could be applied, Con Edison cannot yet demonstrate to this Court that the result it ultimately hopes to achieve—the calculation of new "accurate" equalization rates—would provide it any relief in terms of a reduction of its assessments.

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[35] Under New York law, the duty of the courts is to ascertain whether the assessment and the methodology by which it was produced were "reasonable" or "correct." *See Brooklyn Union Gas Co. v. State Board,* 65 N.Y.2d 472, 485, 482 N.E.2d 77, 81, 492 N.Y.S.2d 598, 602, (1985), *cert. denied,* 106 S. Ct. 1461 (1986); *People ex. rel. Jamaica Water Supply Co. v. Tax Commissioners,* 196 N.Y. 39, 51, 189 N.E. 581 (1909).

[36] Among the recitals to the trial court's order is the acknowledgment that Con Edison consented "to accept" values for its special franchises found in the appraisals submitted to the court by the State Board. Those values are not included as part of the court's order, however, and Con Edison's mere acceptance of them has no legal significance.

That Con Edison demonstrate affirmatively that such relief would be forthcoming is an essential prerequisite to standing in this Court under article III of the Constitution. *See Allen v. Wright,* 104 S. Ct. 3315, 3325 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Thus, even if the Court were to conclude that the order appealed from is final for purposes of 28 U.S.C. §1257(2), the broader requirement of article III of the Constitution that Con Edison demonstrate that it has standing before this Court at this time would remain unsatisfied.[37]

CONCLUSION

As appellant has failed to raise a substantial federal question, and the decision of the court below is so obviously correct as to warrant no further review, this Court should dismiss the appeal or affirm. In the alternative, the Court should decline jurisdiction over the appeal.

MICHAEL WHITEMAN
Counsel of Record
MELVIN H. OSTERMAN, JR.
JONATHAN P. NYE
WHITEMAN OSTERMAN & HANNA
Attorneys for Appellees Village of Pleasantville, et al.
One Commerce Plaza
Albany, New York 12260
(518) 449-7600

July 28, 1986

[37] Similarly, until determinations are made by the trial court concerning the remaining proceedings before this Court, *i.e.*, those relating to the years 1975-1977, Con Edison cannot yet make a showing that it will have standing with respect to any of those proceedings either.

APPENDIX

ORDER OF THE SUPREME COURT

At a Trial Term of the Supreme Court of the State of New York, held in and for the County of Albany at the State Office Building, 333 East Washington Street, Syracuse, New York, on the 10th day of July 1986.

PRESENT:

HON. THOMAS J. LOWERY, JR.,
Acting Supreme Court Justice.

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

-against-

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et. al.,

Respondents,

VILLAGE OF PLEASANTVILLE, et al.,

Intervenors-Respondents.

FINAL JUDGMENT

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Petitioner, Consolidated Edison Company of New York, Inc., having brought the above-entitled proceedings to reduce the assessments on its special franchise property located in the City of New York and certain Westchester Municipalities in which it owns special franchise property for the 1974/75 tax year; and the issues in the proceedings having duly come on to be heard before the Honorable Thomas J. Lowery, Jr., Acting Supreme Court Justice at a Special Term of this Court, held at the State Office Building, 333 East Washington Street, Syracuse, New York; and

WHEREAS, the proceedings were consolidated with proceedings for tax years 1975/76 through 1977/78 by order of the Supreme Court; and

WHEREAS, the Court having ruled on September 24, 1983 granting the motion of the respondents and intervenors-

respondents granting them partial summary judgment against the petitioner dismissing the portions of the petitions seeking to establish that the assessments of petitioner's property were unequal in that the equalization rates used by the State Board of Equalization and Assessment ("SBEA") in determining the assessment did not represent the ratio between the assessed valuation and full valuation in the taxing units where petitioner's property was situated and further denying petitioner's cross-motion seeking to declare RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void; and said order having been affirmed by the Appellate Division Third Department and the Court of Appeals; and,

WHEREAS, petitioner has consented solely with respect to the above-entitled proceedings to accept as the full value of petitioner's property the values set forth in the appraisals of the SBEA submitted in evidence at trial for its "Frozen Base" and "Subsequent" property without admitting to the correctness of the SBEA's appraisals for other proceedings or years;

NOW, on motion of Rosenberg & Tulis, Special Counsel for petitioner, it is adjudged and decreed as follows:

1. The proceedings set forth above are hereby severed from the proceedings for tax year 1975/76 through 1977/78, and are separately consolidated for disposition.

2. RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, is declared constitutional and applicable to the within proceedings.

3. The assessments in question are hereby confirmed and the petitions dismissed, without costs.

Judgment signed this 10th day of July 1986.

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THOMAS J. LOWERY, JR.